

# St. John's Law Review

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Volume 28  
Number 2 *Volume 28, May 1954, Number 2*

Article 1

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May 2013

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### Recommended Citation

Ludwig, Frederick J. (1954) "Journalism and Justice in Criminal Law," *St. John's Law Review*: Vol. 28 : No. 2 , Article 1.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol28/iss2/1>

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# St. John's Law Review

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VOLUME XXVIII

MAY, 1954

NUMBER 2

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## JOURNALISM AND JUSTICE IN CRIMINAL LAW

FREDERICK J. LUDWIG †

ALMOST twenty-five hundred years separate us from the trial of Socrates. To the American lawyer today, the trial described by Plato may appear as a crude episode in the history of criminal justice. The "evidence" consisted of impassioned pleas by accusers to an Athenian mob who often interrupted with applause or howls of disapproval. The same mob were also triers of the issues of fact. If their verdict was not a product of the emotional proceedings, it was only because they had already made up their minds amidst gossip and rumor in the market place. How could this happen today? The first eight amendments to the Federal Constitution list 25 specific protections, including that of free speech, but 17 of these, including the right to a speedy and public trial by an impartial jury, relate to criminal prosecutions. Similar bills of rights controlling local prosecutions appear in the constitutions of each of the 48 states. Ten volumes of Wigmore present only a sample of other statutory and common-law guarantees in a criminal trial. Yet the gap between law in the books and law in action can become so wide as to revive the trial of Socrates as a frequent twentieth-century paradox. The gap consists of an extra-legal climate of opinion created by press, radio and television which surrounds the modern American criminal trial.

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The struggle between press and courts over conduct of judicial proceedings is old and well-documented, but its recrudescence as a serious dilemma of American civilization is relatively recent. It dates from the emergence of a new journalism which followed the industrial revolution, tides of close living, immigration, and mass urbanization. The linotype, high-speed press and instantaneous photograph, coupled with compulsory education and widespread literacy, brought gossip columns, human interest stories and astronomical circulation figures. Conflict between the interest in news and that of a life of dignity free from prying curiosity sprang up first. "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."<sup>1</sup> A new tort, invasion of privacy, emerged to resolve this conflict, but the clash between free press and impartial trial remained.

How extensive is trial by press and radio? Most ordinary criminal causes are duly disposed of by lawyers, judges and jurors in the courtroom according to rules of law. It is the *cause célèbre*—the extraordinary crime of bloodshed or lust, or even an ordinary one involving newsworthy defendants or witnesses—which invokes jurisdiction of a second court for trial by column and wavelength according to canons of journalism. The Hauptmann trial was attended by 141 newspapermen and photographers, 125 telegraphers and 40 messengers.<sup>2</sup> Other homicide trials have been photographed,<sup>3</sup> and more recent ones broadcast,<sup>4</sup> filmed on motion pictures,<sup>5</sup>

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<sup>1</sup> Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890). See also the more recent (but less original) article by the author entitled "*Peace of Mind*" in 48 *Pieces vs. Uniform Right of Privacy*, 32 MINN. L. REV. 734 (1948).

<sup>2</sup> Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure*, 21 A.B.A.J. 301, 304 (1935).

<sup>3</sup> *Ex parte Sturm*, 152 Md. 114, 136 Atl. 312 (1927) (murder); *High v. State*, 197 Ark. 681, 120 S.W.2d 24 (1938) (manslaughter).

<sup>4</sup> *Irwin v. Ashurst*, 158 Ore. 61, 74 P.2d 1127 (1938) (murder); *Earle C. Anthony, Inc. v. Morrison*, 83 F. Supp. 494 (S.D. Cal. 1948), *aff'd mem.*, 173 F.2d 897 (9th Cir.), *cert. denied*, 338 U.S. 819 (1949) (murder).

<sup>5</sup> *E.g.*, the Nuremburg trials. See Taylor, *The Issue is Not TV, But Fair Play*, 12 FED. COM. B.J. 10, 14 (1951).

tape-recorded<sup>6</sup> or even telecast.<sup>7</sup> The average newspaper front page devotes ten to twenty per cent of its space, and an even higher ratio of its headlines, to crime and scandal.<sup>8</sup> Although only ten per cent of radio time is devoted to news, crime is highlighted more in newscasts than in newspapers, to say nothing of dramatic radio programs.<sup>9</sup>

Trial by newspaper begins as soon as the crime is reported with publication of details of its commission and lists of suspects. It continues unabated through arrest, preliminary hearing and indictment of some defendant with disclosure of his confessions, witnesses' statements and comments of police and prosecutor. Usually the unsealed verdict of journalism is reached before the courtroom trial opens.

Techniques of three sorts have been employed.

(1) *Deliberate attempts to influence jurors, judge and witnesses.*—During the Hauptmann trial, polls of public opinion on the defendant's guilt were published, a practice soundly condemned by the American Bar Association.<sup>10</sup> Coupled with declarations of public sentiment, names, addresses and photographs of jurors have been published. Editorial threats to judges have been voiced, ranging from demands for impeachment or legislative inquiry to warnings of defeat at the next election. And the columnist's barbed comment on credibility hangs over the witness giving unpopular testimony like the sword of Damocles.

(2) *"Slanted," one-sided, sensational reports.*—Often, distorted stories have been published without design to affect the outcome. This may result inadvertently from unfamiliarity with legal intricacies or journalistic demand for brevity. Frequently, however, distortion is consciously cre-

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<sup>6</sup> Indiana murder trial rebroadcast. See Charnley, *Should Courtroom Proceedings Be Broadcast?*, 11 FED. COM. B.J. 64, 69 (1950).

<sup>7</sup> *People v. Stroble*, 36 Cal. 2d 615, 226 P.2d 330 (1951), *aff'd*, 343 U.S. 181 (1952) (murder). For telecast of murder trial in Minnesota, see Charnley, *supra* note 6, at 69.

<sup>8</sup> For average newspaper as a whole, the proportion is five to ten per cent. Note, 63 HARV. L. REV. 840 (1950).

<sup>9</sup> LAZARSFELD, *RADIO AND THE PRINTED PAGE* 200 *et seq.* (1940).

<sup>10</sup> See 22 A.B.A.J. 79 (1936).

ated by endowing the all too drab participants in the tragedy of crime with stereotyped glamour. The juvenile delinquent must be trimmed to fit the caption "Boy Desperado." If the victim's body has been burned, a suspect becomes "Torch Fiend." The recent killing and carnal abuse of a six-year-old girl earned defendant headlines such as "Werewolf," "Fiend" and "Sex-Mad Killer."<sup>11</sup> A newspaperwoman explains one of these techniques and its rationale:

There is an unwritten law among the thrill papers for the protection of their readers: never admit a killer is insane until you have to, and fight even then for his sanity. . . . It detracts from the menace and brilliant wickedness of the killer, it cheapens the crime, it ruins the lugubrious threat of the last walk to the electric chair. If it is too obvious the trial itself will be lost.<sup>12</sup>

(3) *Reporting evidence not admitted at trial.*—For these disclosures, the greater the truth, the greater is the danger to an impartial trial. Merely by dint of repeated association in print and picture of the defendant with the crime charged, the logical and legal presumption of innocence may disintegrate into a psychological and emotional one of guilt. Revealing the defendant's prior activities and criminal record nullifies another presumption of good character. Publication of testimony, however veracious, inadmissible because it happens to be hearsay, incompetent, privileged or irrelevant, irreparably deprives the defendant of the protection of the exclusionary rules of evidence. Even if such disclosed testimony would have been admissible, but had not been offered at trial, the defendant still irretrievably loses his rights to sworn testimony and confrontation of the witnesses against him, not to mention his privileges of cross-examination and rebuttal.

The more respectable press may discreetly abstain from such practices, but it is undeniable that they overshadow almost every celebrated criminal cause. Does publication of such matter actually warp the judgment of triers of fact or law and the testimony of witnesses? No experiment has yet

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<sup>11</sup> See *Stroble v. California*, 343 U.S. 181, 190 (1952).

<sup>12</sup> Gilman, *The Truth Behind the News*, 29 AM. MERCURY 139, 141 (1933).

been made. Nor is there one even with a cleverly contrived control-group which could conclusively demonstrate that, *but for* such disclosures, the outcome would be different. As Justice Frankfurter observed:

Science with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court.<sup>13</sup>

The fact of such impact cannot be denied for want of its precise measurement. So widespread was newspaper comment on a New York murder case in 1895 that more than 450 talesmen were examined in *voir dire* before a panel of 12 could be selected, a condition which prompted creation of a "Blue Ribbon" or special jury panel for criminal cases.<sup>14</sup> Experienced judges have long reported the deleterious effect of such publicity.<sup>15</sup> One journalist, referring to the Snyder-Gray convictions for murder in New York, thus credited the power of the press:

The first reporters at the scene of the crime set the tone of it. Ruth Snyder made a bad mistake in her relations with the press and slipped into the Iron Woman category instead of into that of the sympathetic, misunderstood wife. . . . If she had been less flippant and more deft she might have escaped the electric chair as so many pretty husband killers have done, and be applying for a pardon today.<sup>16</sup>

#### THE BALANCE OF FREE SPEECH

It is simple to choose between right and wrong. The problem presented here, however, involves two rights, each an historic, constitutional one: the balance of free speech and

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<sup>13</sup> *Stroble v. California*, *supra* note 11 at 201 (dissenting opinion).

<sup>14</sup> Laws of N.Y. 1896, c. 378 (now N.Y. JUDICIARY LAW § 749-aa).

<sup>15</sup> Jackson, *The Advocate: Guardian of Our Traditional Liberties*, 36 A.B.A.J. 607 (1950); Taft, *Address to the N.Y. Constitutional Convention of 1915*, quoted in Brown, *Some Points on the Law of the Press*, 56 AM. L. REV. 514, 538; Rifkind, *When the Press Collides with Justice*, 34 J. AM. JUD. SOC'Y 46 (1950).

<sup>16</sup> Gilman, *supra* note 12, at 145.

the counterbalance of impartial trial. Its resolution is easy if one interest may be carefully considered and the other happily ignored. In the perspective of the press, news thus published may be a commodity which increases circulation and advertising, but it also satiates the public appetite for current information and enlightenment. "So the people may know" is an ancient responsibility of the press. Crime, its proceedings and participants are of serious community concern and matters properly in the public domain. There may be unfounded criticism and one-sided reporting of criminal proceedings; but journalists are not jurists steeped in the perplexities of law. "There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government."<sup>17</sup> If this "leeway" endangers impartial trial, the argument continues, it is part of the price of a free press. The historic champion of this view, Thomas Jefferson, is thus quoted:

. . . I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.

It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost.<sup>18</sup>

Judicial support for this view is hardly as historic. It stems from two decisions of the Supreme Court in 1941 concerning power to punish for contempt out of court: one with the federal courts, the other with those of the states. The Act of 1789 gave federal courts power to punish for contempt "at the discretion of said courts."<sup>19</sup> Under it, a federal district judge, James H. Peck, imprisoned and disbarred an influential lawyer—appropriately or otherwise named Lawless

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<sup>17</sup> Rutledge, J., concurring in *Pennekamp v. Florida*, 328 U.S. 331, 371-372 (1946).

<sup>18</sup> *PADOVER, DEMOCRACY* 150-151 quoted in *Bridges v. California*, 314 U.S. 252, 270 n.16 (1941).

<sup>19</sup> 1 STAT. 73, 83 (1789).

—who criticized the court's opinion in a civil case on appeal. Lawless complained to his congressman and Judge Peck was impeached. The judge was acquitted by a single vote, but the prosecuting senator introduced a bill, which became the Act of March 2, 1831, limiting summary punishment to "misbehaviour" in "the presence of" the court or "so near thereto as to obstruct the administration of justice."<sup>20</sup> In 1918 the Supreme Court construed "near" as a requirement only of direct causation.<sup>21</sup> But, in *Nye v. United States*,<sup>22</sup> the decision was overruled and the Court held that "near" is a geographical limitation so that the "misbehaviour" must occur in the vicinity of the court.

The second case, *Bridges v. California*,<sup>23</sup> held that a state court could punish for contempt neither a newspaper for editorially dissuading a judge from lenient treatment for convicted union personnel under the caption, "Probation for Gorillas," nor, on the other hand, a labor leader for his published telegram to the Secretary of Labor threatening a strike if an injunction should issue. Following the *Bridges* case, a Florida court was reversed for holding in contempt a newspaper and its associate editor who conducted an anti-vice campaign by editorial and cartoon inferring that judges were using technicalities to impede prosecution of rape and gambling cases.<sup>24</sup> And a similar Texas decision, based on newspaper editorials flagrantly applying direct pressure to a judge who was weighing a motion for new trial in a civil case, was also reversed.<sup>25</sup>

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<sup>20</sup> 4 STAT. 487, 488 (1831) (later, JUDICIAL CODE § 268). The present statute [62 STAT. 701 (1948), 18 U.S.C. § 401 (Supp. 1949)] is limited by Rule 42 of the Federal Rules of Criminal Procedure which permits summary punishment only if the judge certifies that he saw or heard the contemptuous conduct, and that it was committed in the "actual presence of the court." [subd. (a)]. Otherwise, the contempt must be prosecuted upon notice and hearing. [subd. (b)]. See also *In re Oliver*, 333 U.S. 257 (1948) (contempt outside court must be publicly tried with opportunity for defendant to meet charge, testify, subpoena witnesses and have counsel).

<sup>21</sup> *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918). "The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty. . . ." *Id.* at 419.

<sup>22</sup> 313 U.S. 33 (1941).

<sup>23</sup> 314 U.S. 252 (1941).

<sup>24</sup> *Pennekamp v. Florida*, 328 U.S. 331 (1946).

<sup>25</sup> *Craig v. Harney*, 331 U.S. 367 (1947).



Because criminal law enforcement is primarily a state function, these decisions cast a longer shadow on the guarantee of impartial trial than the *Nye* case. The *Bridges* case was the first to apply the "clear and present danger" test of free speech to the contempt power of state courts. The First Amendment in the Federal Constitution, of course, never directly applied to states,<sup>26</sup> and for many years after adoption of the Fourteenth Amendment it had been supposed that its due process clause did not absorb and make it so applicable.<sup>27</sup> Once applied,<sup>28</sup> the First Amendment, which explicitly limits only the legislative branch of the United States, was still believed no prohibition on judicial power. Mr. Justice Holmes, author of the "clear and present danger" test, indicated even more clearly that the test did not apply to the contempt power of state courts in criminal causes.<sup>29</sup> But now, under the test, the danger must be "an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil" such as "to cause a march on the court house."<sup>30</sup>

#### THE COUNTERBALANCE OF IMPARTIAL TRIAL

As fundamental as free speech is, administration of justice by an impartial judiciary antedates it by centuries in the history of civilization. Long before 1941, the Supreme Court had scrutinized state criminal proceedings to guarantee impartial trial, reversing convictions for mob domination of a

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<sup>26</sup> *Barron v. Mayor of Baltimore*, 7 Pet. 243 (U.S. 1833).

<sup>27</sup> *Cf. Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 543 (1922); ". . . [N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence' . . . ."

<sup>28</sup> *Near v. Minnesota*, 283 U.S. 697 (1931). See also *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (application of First Amendment to States by way of Fourteenth assumed *arguendo*).

<sup>29</sup> *Patterson v. Colorado*, 205 U.S. 454 (1907). Holmes cited this case with approval in the decision announcing the "clear and present danger" test. *Schenk v. United States*, 249 U.S. 47, 52 (1919).

<sup>30</sup> *Craig v. Harney*, 331 U.S. 367, 375, 376 (1947). See also *Murphy, J.*, concurring in *Pennekamp v. Florida*, 328 U.S. 331, 370 (1946): "It also includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous. To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice."

courtroom,<sup>31</sup> psychological coercion of a defendant,<sup>32</sup> pecuniary interest of a judge,<sup>33</sup> and discriminatory selection of jurors.<sup>34</sup> Impartial criminal trial, dishonored though it may be by some contemporary sovereigns, is certainly not less fundamental to liberty than free speech. Is it not absurd to entertain so overriding a conception of one freedom as to paralyze another in the Bill of Rights? Anyone handing a pencilled note commenting on a trial to a single juror on the courthouse steps may be summarily committed for contempt. Identical comment in linotype handed to every juror fifty feet from the courthouse steps where they purchase their newspaper is beyond the pale of judicial censure.<sup>35</sup> By contrast, the experience of the English—democratically devoted to free speech—is enlightening, and deserves examination.

In 1949, a little girl was murdered in Washington, D. C., and within ten days another was stabbed to death in Baltimore. A suspect was taken into custody. A Baltimore commentator interrupted radio programs, "Stand by for a sensation." The arrest of the suspect was announced. The commentator then went on to say that the suspect had confessed, had re-enacted the crime, had dug up the knife used in the murder and had a long criminal record. The Criminal Court of Baltimore fined the broadcaster for contempt for "not merely a clear and present danger to the administration of justice, but an actual obstruction" of it. The highest court of Maryland reversed, citing the *Bridges*, *Pennekamp* and *Craig* cases, and the Supreme Court refused to review this decision.<sup>36</sup> Yet in the same year, a so-called "Bluebeard" was arrested for murder in England. The *London Daily Mirror* described him as a "vampire," published a photograph of one of his alleged victims with gruesome details of the killing and stated that he had committed other murders. The editors

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<sup>31</sup> *Moore v. Dempsey*, 261 U.S. 86 (1923).

<sup>32</sup> *Chambers v. Florida*, 309 U.S. 227 (1940).

<sup>33</sup> *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>34</sup> *Pierre v. Louisiana*, 306 U.S. 354 (1939).

<sup>35</sup> See Rifkind, *When the Press Collides With Justice*, 34 J. AM. JUD. Soc'y 46, 50 (1950).

<sup>36</sup> *Baltimore Radio Show, Inc. v. State*, 193 Md. 715, 67 A.2d 497 (1949), cert. denied, 338 U.S. 912 (1950).

received a three months' jail sentence and the publishers were fined £10,000.<sup>37</sup>

Under the English test, any publication "reasonably calculated" to interfere with administration of justice is contumacious. No actual interference need be shown. Even if such publication is not intended to interfere, if it was only "one which might conceivably prejudice a pending trial," contempt is still possible depending upon "the circumstances of the case."<sup>38</sup> Its scope covers civil as well as criminal proceedings and all sorts of publicity.<sup>39</sup> Maximum protection is accorded juries, especially in criminal trials. Enterprising editors employing "criminal investigators" and publishing highly prejudicial material, whether inadmissible at trial<sup>40</sup> or admissible but not yet introduced,<sup>41</sup> have been severely punished. Published comments on the merits of a pending case, even in civil causes, are punishable as contempts by whomsoever made.<sup>42</sup> Next in order of protection are witnesses who may be improperly influenced. Mere publication of the photograph of the accused before trial in which his identity was in issue was held contumacious because likely to prejudice witnesses.<sup>43</sup> Their naturally high motivation justifies least protection in the case of parties who are not easily induced to compromise civil causes. Yet the court held in contempt a husband who advertised above his name in connection with his wife's divorce action:

25/ [pounds] reward will be paid for full and legal evidence of the confinement of a certain young married woman [and for delivery] of a female child, probably not registered, on or just before February 7, 1885. . . .<sup>44</sup>

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<sup>37</sup> *Rex v. Bolam*, 93 Sol. J. 220 (1949).

<sup>38</sup> *Rex v. Editor of Daily Mail*, 44 T.L.R. 303, 306 (K.B. 1928).

<sup>39</sup> *Rex v. Hutchison*, 80 Sol. J. 723 (1936) (newsreels); *Rex v. Hudson*, [1936] 2 K.B. 595 (circular letters); *Onslow's and Whalley's Case*, L.R. 9 Q.B. 219 (1873) (public speeches).

<sup>40</sup> *Rex v. Tibbits*, [1902] 1 K.B. 77 (six weeks imprisonment).

<sup>41</sup> *Rex v. Clarke*, 103 L.T. 636 (K.B. 1910) (£1000 fine and costs).

<sup>42</sup> *Daw v. Eley*, L.R. 7 Eq. 49 (1868) (letter to newspaper by counsel in patent suit); *In re The William Thomas Shipping Co.*, [1930] 2 Ch. 368 (party in published interview criticizes plaintiffs in bankruptcy action).

<sup>43</sup> *Rex v. Daily Mirror*, [1927] 1 K.B. 845.

<sup>44</sup> *Butler v. Butler*, 13 P.D. 73 (1888). *But cf.* *Plating Co. v. Farquharson*, 17 Ch. D. 49 (1881) (bona fide offer not contempt). See Goodhard, *Newspapers and Contempt of Court*, 48 HARV. L. REV. 885 (1935).

Publications unduly critical of judge or judiciary during trial also affect jurors, witnesses and parties, and so may be held contemptuous on those grounds alone. But protection for jurors, witnesses and parties abruptly ceases when the case is concluded; for judge or judiciary as such, critical comment amounting to "scandalizing the court" may be punishable even after termination of trial.<sup>45</sup> In this single respect, English contempt power exceeds minimum protection necessary for fair trial in a particular case.

By historical accident, customary procedure in out of court contempt cases is summary, although occasionally prosecution may be by indictment and trial by jury.<sup>46</sup> In 1765, a book-seller named Almon published an attack on Lord Mansfield for his conduct of proceedings against John Wilkes. Summary proceedings by attachment were commenced against Almon. Wilmot, J., prepared an opinion stating that summary procedure in such cases was the immemorial usage, although Sir John Fox has shown that the historical fact was trial by jury.<sup>47</sup> The case was abandoned and the opinion never delivered. It was, however, published posthumously by Wilmot's son,<sup>48</sup> and taken by Blackstone to be the law.<sup>49</sup>

In practice, then, the aggrieved party in English contempt cases may proceed without necessity of indictment by application for writ of attachment or motion for committal of persons responsible. If a judge or court has been the victim, the Director of Public Prosecutions usually makes application, although the court may institute proceedings on its own motion. Hearing is granted the accused before the judge conducting the trial in question, except that when the judge himself has been criticized, the practice is for him not to sit at this hearing.<sup>50</sup> Upon a finding of guilt, punishment by imprisonment or fine, or both, is discretionary. Since appeals may be taken only from convictions after indictment or

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<sup>45</sup> *Regina v. Gray*, [1900] 2 Q.B. 36.

<sup>46</sup> *E.g.*, in *Rex v. Tibbits*, [1902] 1 K.B. 77.

<sup>47</sup> Fox, *HISTORY OF CONTEMPT OF COURT* (1927) *passim*.

<sup>48</sup> WILMOT, *NOTES OF OPINIONS AND JUDGMENTS* 243 (1802).

<sup>49</sup> 4 BL. COMM. \*284 *et seq.*

<sup>50</sup> *Daw v. Eley*, L.R. 7 Eq. 49 (1868).

information,<sup>51</sup> there is no right of appeal from summary conviction of contempt, unless the Attorney General or Director of Public Prosecutions acquiesces,<sup>52</sup> or in cases from courts of some dominions in accordance with provisions of their charters or statutes.<sup>53</sup>

A survey of statutes and cases in 48 states (APPENDIX, *infra*) indicates that a majority of states either have no statute defining contempt, or merely a general one, and presumably would punish out of court contempt as do the English but for the intervention of the clear and present danger test. A minority of states apparently would not punish publications interfering with fair trial, either under statutes patterned after the Federal Act of 1831 which requires misbehavior to be "so near," or under statutes and cases holding privileged accurate or fair reports of judicial proceedings. It is clear that, prior to 1941, the rule in England had been favored in most American jurisdictions, and in neither place had it been found ill-suited to guarantees of free speech.

#### SOLVING THE DILEMMA

Several solutions to the enigma of apparently conflicting constitutional rights of free speech and impartial criminal trial have been proposed. After careful consideration, they must be rejected.

(a) A narrowly-drawn contempt statute has been suggested. Such a statute would cover only the period from first, formal charge to conviction or acquittal, and define as contempt publication of the accused's criminal record, his confessions or admissions, opinions as to his guilt, supposed testimony relating to his guilt, comments on credibility of witnesses at his trial and matter prejudicial to him excluded at his trial. Indictment and trial by jury would be substituted for summary procedure in contempt. Advocates of this solution point to the sharp division of the Supreme Court in

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<sup>51</sup> Criminal Appeal Act, 1907, 7 Edw. VII, c. 23.

<sup>52</sup> *In re The William Thomas Shipping Co.*, [1930] 2 Ch. 368.

<sup>53</sup> See *Pevashuram Deteram Shandasani v. King-Emperor*, [1945] A.C. 264 (P.C.).

the *Bridges* and *Craig* cases, the Court's condemnation of both indefinite common-law contempt provisions in absence of legislative appraisal,<sup>54</sup> and summary procedure,<sup>55</sup> as well as indications that the Court might more readily find danger if the jury rather than the judge alone were involved.<sup>56</sup>

It must be seriously doubted whether a statute could be drafted narrowly enough to avoid the Scylla of the clear and present danger test without failing to escape the Charybdis of improper influence by publication on criminal trials. The presumption of constitutionality accorded statutes is withdrawn from legislation in the free speech area and sometimes becomes a presumption of invalidity.<sup>57</sup> Frequently, the Supreme Court construes such statutes not in the light of the validity of challenged action taken under them, but mischief possible in their name.<sup>58</sup> The test of clear and present danger presents a factual question from whose determination the Supreme Court will not be pre-empted by a state court's finding or a statute's preamble.<sup>59</sup> And in the Supreme Court's view, such danger must so "immediately imperil" as to "cause a march on the court house."<sup>60</sup> Despite English experience and the practice of many states prior to 1941 in thus controlling contumacious publications without sacrificing a free press, charting a legislative course in this direction would be setting sail on a sea of constitutional doubt.

(b) A single state provides a statutory cause of action for any party "aggrieved" by publication concerning his trial, which would "improperly tend to bias the minds" of the triers.<sup>61</sup> No cases have been reported under this provision, and the reason should be obvious. To be "aggrieved," the party would probably have to lose the original action, and, in addition, establish that but for the publication the outcome would have been different.

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<sup>54</sup> See *Bridges v. California*, 314 U.S. 252, 260 (1941).

<sup>55</sup> See *Craig v. Harney*, 331 U.S. 367, 373 (1947).

<sup>56</sup> See *Pennekamp v. Florida*, 328 U.S. 331, 348 (1946).

<sup>57</sup> See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>58</sup> See *Saia v. New York*, 334 U.S. 558 (1948); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

<sup>59</sup> *Craig v. Harney*, *supra* note 55 at 373.

<sup>60</sup> *Id.* at 375, 376.

<sup>61</sup> PA. STAT. ANN. tit. 17, § 2045 (Purdon, 1930).

(c) Exhaustion of judicial correctives, such as cautioning jurors on reading newspapers, declaring a mistrial or granting a new trial, is said to be sufficient protection against prejudicial publications. In the face of inflammatory comment, cautioning the jury often is fighting the fire with combustible fluid. To the average juror, fruit forbidden becomes all the more irresistible. Jurors may of course be examined and dismissed if they admit violating the court's instructions against reading newspapers,<sup>62</sup> but alternates for their replacement upon this contingency are ordinarily insufficient. In extreme cases, jurors may be locked up,<sup>63</sup> but as a practice this would drain jury service of what little glamour it retains.

Declaring a mistrial or granting a new trial is at most a Pyrrhic victory for the defendant. Not only must he bear the expense, inconvenience and delay of defending the prosecution again, but there is little reason to suppose that prejudicial impressions of the first jury will be erased from the minds of the second. And if harmful comment should attend the new trial, defendant will find himself in a Sisyphean situation. Moreover, the insurmountable obstacle of proving prejudicial impact of such publications often makes these remedies unavailable on such grounds.<sup>64</sup>

(d) Voluntary restraint by press and radio is still suggested,<sup>65</sup> despite repeated failure of press and bar to agree on a program.<sup>66</sup> The respectable segment of the press would no doubt welcome some sort of regulation. Other newspapers, however, are too competitively aware of the high correlation between front page crime reports, on one hand, and circulation figures and advertising revenues, on the other,

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<sup>62</sup> Cf. *State v. Simmons*, 120 N.J.L. 85, 198 Atl. 294 (1938) (juror qualified though he formed an opinion based on newspaper accounts which he said could be overcome by evidence).

<sup>63</sup> Cf. *Holt v. United States*, 218 U.S. 245 (1910) (no error to allow jurors to separate with result that they read newspaper account of trial).

<sup>64</sup> See *People v. Stroble*, 343 U.S. 181, 195 (1952): "... [H]ere, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."

<sup>65</sup> See Rifkind, *When the Press Collides With Justice*, 34 J. AM. JUD. Soc'y 46, 51-52 (1950).

<sup>66</sup> See 8 J. AM. JUD. Soc'y 133 (1925).

to make self-regulation a probable program.<sup>67</sup> In any event, no legal sanction could be imposed for violations of such "gentlemen's agreements," and it is absurd to assure an impartial trial only when the press is agreeable.

Clearly the problem cannot be solved by any precipitate panacea. A workable objective should be alleviation of the abuses, not their annihilation. The means ought to improve procedures of bench and bar, rather than punish the press. Four proposals are offered as a partially practicable program:

(1) *Exclusion of press and public in appropriate cases.*—All states except seven<sup>68</sup> have constitutional provisions similar to the federal guarantee of a public trial. Thirteen states, by constitutional or statutory provision, permit exclusion of minors or the public generally under varied circumstances, ranging from trials for any crime to ones involving sex crimes, matrimonial matters, illegitimacy and juvenile delinquency.<sup>69</sup> These and other states have also made similar exclusions by judicial decision.<sup>70</sup> Restrictions of space alone, not to mention sanitation and safety, make an unlimited public trial physically impossible. Unless a celebrated case can

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<sup>67</sup> See 23 J. CRIM. L. & CRIMINOLOGY 191, 203 (1932) and 20 *id.* 246, 289 (1929), cited in Note, 63 HARV. L. REV. 840, 844 (1950).

<sup>68</sup> Delaware, Maryland, Massachusetts, Nevada, New York, Virginia and Wyoming. Of these, New York guarantees public trial by statute. N.Y. CODE CRIM. PROC. § 8(1); N.Y. JUDICIARY LAW § 4.

<sup>69</sup> ALA. CONST. Art. 6, § 169; ALA. CODE tit. 15, § 320 (1940) (rape, assault with intent to ravish, or vulgar, obscene evidence tending to debauch youth); CONN. GEN. STAT. § 2812 (1949) (juvenile trials); GA. CODE tit. 81, § 81-1006 (1933) (seduction, divorce or vulgar, obscene evidence tending to debauch youth); MASS. LAWS ANN. c. 278, § 16A (1933) (rape, incest, carnal abuse or other sex crimes involving parties under 18; paternity proceedings; criminal actions involving husband and wife); MICH. COMP. LAWS §§ 604.6, 726.18 (1948) (minors at scandalous trials; in Detroit Recorder's Court, evidence of lascivious, degrading acts and minors under 16 without guardians); NEV. COMP. LAWS § 8405 (1929) (divorce, on party's demand); N.Y. JUDICIARY LAW § 4 (divorce, seduction, abortion, rape, assault with intent to rape, sodomy, bastardy and filiation); N.C. GEN. STAT. ANN. § 15-166 (1953) (rape, assault with intent to rape); N.D. REV. CODE §§ 27-0102, 29-0128 (1943) (defendant under 18 or scandalous, obscene trial); S.C. CODE tit. 15, §§ 15-1194, 15-1225(17) (1952) (child as defendant, and Family Court generally); VT. STAT. §§ 1273, 3228 (1947) (minors; others at scandalous, obscene trial and domestic relations matters); VA. CODE ANN. tit. 19, § 19-219 (1950) (any criminal case); WIS. STAT. § 256.14 (1951) (minors in scandalous, obscene trial).

<sup>70</sup> See cases collected in Note, 156 A.L.R. 265 (1945); see 28 TEX. L. REV. 265 (1949), 3 VAND. L. REV. 125 (1949).



be transferred to a spacious sports stadium, the race must still be to the swiftest among spectators. "The requirement of a public trial is for the benefit of the accused. . . ." <sup>71</sup> Accordingly, if a defendant may waive trial by jury, he may also waive public trial.<sup>72</sup> Conversely, if the defendant has neither had nor waived public trial, prejudice is presumed and his conviction will be reversed.<sup>73</sup> In 1953, an appellate court for the first time, however, decided whether the press as an aggrieved party could compel admission to a trial from which they had been excluded on grounds not explicitly mentioned by statute.<sup>74</sup> In *Matter of United Press Associations v. Valente*,<sup>75</sup> Minot F. Jelke, widely heralded as heir to an oleomargarine fortune, had been convicted of conspiracy to injure public morals and of living on the proceeds of prostitution after trial from which press and public had been excluded by the court during the prosecution's case. The court held the application for the order by the press properly denied:

The public interest in a public trial stems not from a right of every citizen to be a spectator, but consists in keeping the fabric of society from being injured by the destruction of civil rights of the individual.<sup>76</sup>

Presence of the public in the courtroom aids no more in acquitting the innocent and convicting the guilty than it would reassure the surgeon and patient in the operating room. Yet maintaining public confidence in equal justice is

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<sup>71</sup> 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed., Carrington, 1927).

<sup>72</sup> *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949); *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *People v. Miller*, 257 N.Y. 54, 177 N.E. 306 (1931); *Keddington v. State*, 19 Ariz. 457, 172 Pac. 273 (1918); *People v. Harris*, 302 Ill. 590, 135 N.E. 75 (1922); *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914); *Carter v. State*, 99 Miss. 435, 54 So. 734 (1911); *State v. Smith*, 90 Utah 482, 62 P.2d 1110 (1936).

<sup>73</sup> *In re Oliver*, 333 U.S. 257 (1948); *Tanksley v. United States*, 145 F.2d 58 (9th Cir. 1944); *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921); *People v. Hartman*, 103 Cal. 242, 37 Pac. 153 (1894); *Tilton v. State*, 5 Ga. App. 59, 62 S.E. 651 (1908); *People v. Murray*, 89 Mich. 276, 50 N.W. 995 (1891); *State v. Keller*, 52 Mont. 205, 156 Pac. 1080 (1916); *State v. Hensley*, 75 Ohio St. 255, 79 N.E. 462 (1906); *State v. Osborne*, 54 Ore. 289, 103 Pac. 62 (1909); *State v. Jordan*, 57 Utah 612, 196 Pac. 565 (1921).

<sup>74</sup> For New York statute, see note 69 *supra*.

<sup>75</sup> 281 App. Div. 395, 120 N.Y.S.2d 174 (1st Dep't 1953).

<sup>76</sup> *Id.* at 400, 120 N.Y.S.2d at 179-180.

as important as assuring the administration of justice itself. The *Valente* precedent is a worthwhile judicial weapon but its use must be restricted to extraordinary cases, else the opprobrious label "secret trial" will make the game not worth the candle.<sup>77</sup> It goes without saying that maintenance of this same confidence requires exclusion of broadcasts and telecasts of trials.<sup>78</sup>

(2) *Disciplining attorneys and public officers.*—Notwithstanding exclusion of press and public in the *Jelke* case, an attorney was reported as giving newspapermen a running account of proceedings. In a widely publicized sex murder of a child, "[t]he district attorney, even before defendant completed his statement, released to the press details of the statement (including defendant's admissions of sex play with his victim and other children on occasions prior to the killing) and also announced his belief that defendant was guilty and sane."<sup>79</sup> In a celebrated espionage case, the court assumed that the prosecutor, during the course of trial, made public a certain sealed indictment to the prejudice of defendants and that "... publication of the indictment was deliberately 'timed' . . . . Such assumed tactics cannot be too severely condemned."<sup>80</sup> The frequency of such practices indicates need for vigorous enforcement of the American Bar Association's canon condemning them by censure, suspension and

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<sup>77</sup> See Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 383-384 (1932): "It must, then, be admitted that a public trial was a common law right, but we are justified in asking whether at common law it did the prisoner any good or was intended to do him any good. . . . [I]t is more than doubtful that it was the prisoner's interest which created the practice."

<sup>78</sup> Cf. Laws of Ga. 1949, Act No. 136 (television and broadcasts prohibited); Wis. STAT. § 348.61 (1951) (*id.*); N.Y. CIVIL RIGHTS LAW § 52 (broadcasts, telecasts and newsreels forbidden). *The New York Times*, March 24, 1953, p. 30, col. 2, editorially condemned television for presidential press conferences as annoying to newspapermen: "Would the President have to use stage makeup? If he would, or wouldn't, would the newspaper men do so? Would the newspaper men be thinking of the news they hoped to get or would they tend more and more to become actors in a nation-wide drama? We know newspaper men. They are hard-working, self-effacing and modest to a fault. But would they remain so under the contemplated circumstances? Would anybody?"

<sup>79</sup> *People v. Stroble*, 36 Cal. 2d 615, 226 P.2d 330, 333-334 (1951), *aff'd*, 343 U.S. 181 (1952).

<sup>80</sup> *United States v. Rosenberg*, 200 F.2d 666, 670 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1953).

even disbarment of attorneys in extreme cases.<sup>81</sup> Similar disciplinary measures could be invoked against such tactics by public personnel concerned in criminal prosecutions by the authorities employing them. Neither exclusion of the public nor disciplinary proceedings against officers of court and state are likely to raise constitutional questions of denial of free speech since no penal sanctions are involved. Concededly, neither remedy is complete since witnesses would still be free to publish interviews both before and during trial.

(3) *Automatic change of venue.*—The utility of change of venue as a device for avoiding prejudicial pre-trial publicity is diminished by state-wide newspapers and radio broadcasts, and the fact that publicity is likely to move with the trial. For this reason alone, change of venue may be denied.<sup>82</sup> Nevertheless, to make such change a matter of right in felony cases widely commented upon in the press would deter some of these abuses before trial by the threatened loss to the locality of the trial itself. To prevent "shopping around" by the defendant for a favorable judge and jury, the trial court should select the county or district to which the case is sent.

(4) *Special panel of jurors.*—A survey of state statutes on selection of jurors indicates that only one jurisdiction provides a special list of talesmen to either side when "the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained. . . ." <sup>83</sup> Special juries can be traced as far back as Magna Carta. Mankind understandably varies in ability

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<sup>81</sup> CANONS OF PROFESSIONAL ETHICS, AMERICAN BAR ASSOCIATION Canon 20: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement."

<sup>82</sup> State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897).

<sup>83</sup> N.Y. JUDICIARY LAW §749-aa(4) [constitutionality sustained in Fay v. New York, 332 U.S. 261 (1947); Hall v. Johnson, 186 U.S. 480 (1901) (predecessor statute)].

to set aside impressions formed by reading newspapers. Men and women specially selected from a cross-section of the community and made available in celebrated criminal cases would go a long way in making judicial armor against prejudicial publications impenetrable.

### CONCLUSION

One of the most revered legal fables is that modern trial by jury sprang full-grown, like the Boticellian Aphrodite, from the Magna Carta's guarantee to the nobleman of the "judgment of his peers" in a trial at the king's suit in the House of Lords. For the less favored multitude, the institution had to win its spurs in sharp competition with trials by ordeal and oath, and was to assume its current shape only after centuries of development. Reflection upon alternate methods of resolving disputed issues of fact indicates why trial by jury emerged as most popular. Ordeal by fire involved the accused's taking in hand a piece of red-hot iron, or his walking barefoot and blind-folded over nine red-hot ploughshares laid lengthwise at unequal distances. If the party escaped unhurt, he was adjudged innocent; but if it happened otherwise, "as without collusion it usually did,"<sup>84</sup> he was then condemned as guilty. In water-ordeal, the defendant was required to plunge his bare arm elbow-deep in boiling water without being scalded to establish his innocence. Alternatively, the accused was tossed into a pond of cold water, and acquittal, a questionable victory indeed, could be attained only by sinking. In the bilateral ordeal by battle, which survived abolition until 1819, the accused escaped conviction by avoiding decapitation in day-long judicial combat with double-edged Frankish war axes. In the thirteenth and fourteenth century city of London, a defendant accused of homicide might purge himself by swearing six times, each oath backed by six oath-helpers so that, in all, thirty-seven

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<sup>84</sup> 4 BL. COMM. \*343. *But cf.* 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 599 (2d ed. 1899): "Such evidence as we have seems to show that the ordeal of hot iron was so arranged as to give the accused a considerable chance of escape."

persons swore. Such wager of law at Westminster was early debased by the emergence of a union of compurgators who swore for their living. When, at last, the accused was given the election of putting himself upon the country, the jury, as neighborhood witnesses of the crime, continued for hundreds of years to be the source of proof as much as the arbiters of such proof.

The revered fable of journalism, on the other hand, is that the owner of a syndicated press chain is likely to share the eagerness of Socrates to speak the truth even if he must die. Actually, the balance-sheet becomes a more important document than the editorial page.<sup>85</sup> Newspapers and magazines may publish articles to satiate the public appetite for current information and enlightenment, but they also do so to increase their circulation and profits. Such dual and divergent objectives sometimes may both be subserved to promote criminal justice. The grossly mishandled investigation of the Halls-Mills murders of 1922 was reopened in 1926 because of the coincidence of the frenzied campaign of a recently established New York tabloid to cultivate a readership through sensational columns on the "Unsolved Mystery of the Slain Minister and His Beautiful Choir Singer."<sup>86</sup> More typical, however, of the consequences of trial by newspaper was the most celebrated criminal case of the century, the Leopold-Loeb murder of Bobby Franks. In the face of widespread and overwhelmingly hostile press comment, the most highly experienced and remunerated defense counsel had his clients plead guilty to the capital crime, and sought a hearing before a judge in mitigation of punishment, on the ground that nothing less than death could be expected from a jury even on a reasonably well-documented defense of insanity. Unfortunately, this simple and direct escape from the full impact of press comment by guilty plea and waiver of jury is not available in every jurisdiction when a capital offense is involved.

Fables aside, the frequently conflicting interests in free press and fair trial remain without instantaneous solution.

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<sup>85</sup> CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 522 (1941).

<sup>86</sup> BUSCH, *THEY ESCAPED THE HANGMAN* 178-179 (1953).

Trip-hammer panaceas such as curbing the press, on the one hand, or sacrificing trial by jury, on the other, have irresistible glamour for the proponents of immediate reform. Both run counter to too much in the warp and woof of the Anglo-American fabric. The solution to this—as it has been to so many other socio-legal dilemmas—may well involve patient application of highly specific remedies on a case by case, trial and error basis. This may be dull and tedious, but it is also likely to provide a solution genuine and ultimate.

## APPENDIX

## STATUTES PUNISHING CONTEMPT OUT OF COURT

Require misbehavior "so near" to court's presence	Newspaper commentaries on court proceedings contemptuous	General common-law provisions
<b>Ala.</b> CODE tit. 13, §§ 2, 9, tit. 15, § 27 (1940).	<b>Cal.</b> PENAL CODE § 166(7), CODE CIV. PROC. § 1209 (Deering, 1949).	<b>Ark.</b> STAT. § 34-901 (1947).
<b>Ariz.</b> CODE ANN. § 27-604 (1939).	<b>Idaho</b> CODE ANN. § 18-1801(7) (1947).	<b>Colo.</b> * * *
<b>Ga.</b> CODE tit. 24, § 24-105 (1933).	<b>Ind.</b> STAT. ANN. § 3-905 (Burns, 1946).	<b>Conn.</b> GEN. STAT. § 7702 (1949).
<b>Md.</b> CODE ANN. art. 26, § 4(1) (Flack, 1951).	<b>Ky.</b> REV. STAT. ANN. §§ 432.240, 432.280, 432.290 (1943).*	<b>Del.</b> CODE ANN. tit. 11, §§ 451, 452 (1953).
<b>Ohio</b> REV. CODE ANN. tit. 27, § 27-2705.01, tit. 23, § 23-2317.05 (Baldwin, 1953).	<b>Mich.</b> COMP. LAWS c. 605, § 605.1(10) (1948).*	<b>Fla.</b> STAT. §§ 38.22, 38.23, 932.03, 932.04 (1951).
<b>Okla.</b> STAT. tit. 21, § 565 (1951).	<b>Minn.</b> STAT. § 613.69(7) (1949).*	<b>Ill.</b> * * *
<b>Va.</b> CODE ANN. tit. 18, § 18-255(1) (1950).	<b>Mont.</b> REV. CODE tit. 94, § 94-2807 (1947).*	<b>Iowa</b> CODE c. 665, § 665.2 (1950).
<b>W. Va.</b> CODE ANN. § 6024(a) (Michie, 1949).	<b>N. Y.</b> PENAL LAW § 600(7).*	<b>Kan.</b> GEN. STAT. ANN. § 20-1201 (1949).
	<b>N. C.</b> GEN. STAT. ANN. § 5-1(7) (Michie, 1952).*	<b>La.</b> REV. STAT. tit. 15, § 15:11 (1950).
	<b>N. D.</b> REV. CODE § 27-1001(6) (1943).*	<b>Me.</b> REV. STAT. c. 91, § 7 (1944).
		<b>Mass.</b> LAWS ANN. c. 185, § 25A, c. 215, §§ 34, 57, c. 219, § 9 (1933).
		<b>Miss.</b> CODE ANN. § 1656 (1942).

**Pa.** CONST. ART. 1, § 7, STAT. ANN. tit. 17, §§ 2041, 2044 (1930).  
**S. D.** CODE § 13.1235(7) (1939).  
**Wash.** REV. CODE § 9.23.010(7) (1952).  
**Wis.** STAT. § 256.03(6) (1951).\*

**Mo.** REV. STAT. § 476.110 (1949).  
**Neb.** REV. STAT. § 25-2121 (1948).  
**Nev.** COMP. LAWS §§ 8941, 8943, 8944 (1929).  
**N. H.** \* \* \*  
**N. J.** STAT. ANN. tit. 2A, § 2A:10-1 (1952).  
**N. M.** STAT. ANN. § 16-102 (1941).  
**Ore.** REV. STAT. c. 33, § 33.010 (1953).  
**R. I.** GEN. LAWS c. 497, § 6, c. 500, § 30 (1938).  
**S. C.** GEN. STAT. ANN. tit. 15, §§ 15-12, 15-13 (1952).  
**Tenn.** CODE ANN. § 10119(4) (1934).  
**Tex.** STAT. arts. 1736, 1826, 1911, 1955 *et al.* (1948).  
**Utah** CODE ANN. tit. 78, § 78-32-1 (1953).  
**Vt.** STAT. §§ 1390, 1397 (1947).  
**Wyo.** COMP. STAT. ANN. § 14-1601 (1945).

\*\*\* No statute.

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\* True reports privileged.

\*\* Non-libellous reports privileged.